Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1996

In re: EXCEL CORPORATION, CARGILL, INC.
FREDDIE FRANKLIN; STEVE STEFFE,

v.

EFREN RENDON, et al.,
Petitioners.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A UNITED STATES COURT OF APPEALS EXCEEDS ITS JURISDICTIONAL BOUNDARIES BY REVIEWING A CONSOLIDATION AND REMAND ORDER ISSUED BY A DISTRICT COURT WHEN THE DISTRICT COURT GIVES A LACK OF SUBJECT MATTER JURISDICTION AS ONE OF ITS REASONS FOR REMAND.

II. WHETHER A UNITED STATES DISTRICT COURT'S ORDER OF CONSOLIDATION MADE SPECIFICALLY FOR THE PURPOSE OF REMAND IS REVIEWABLE DESPITE THE FACT THAT THE ORDER FOR REMAND IS NOT REVIEWABLE.

LIST OF ALL PARTIES

PETITIONERS:

1. Efren Rendon

   Mr. Rendon is Plaintiff at the trial court level in case No. B-94-313, *Rendon v. Excel Corporation, Cargill, Inc., and Freddie Franklin.*

2. Ramon Trevizo

   Mr. Trevizo is Plaintiff at the trial court level in case No. B-94-321, *Trevizo v. Excel Corporation, Cargill, Inc., and Freddie Franklin,* and in case No. B-94-322, *Trevizo v. Excel Corporation, Cargill, Inc., and Freddie Franklin.*

3. Roberto Moreno

   Mr. Moreno is Plaintiff at the trial court level in case No. B-94-323, *Moreno v. Excel Corporation, Cargill, Inc., and Steve Steffe.*

4. Alfredo Quezada, Charles White, Oscar Mendez, Mary Morales, Alfredo Vuittonet, Phillip Riley, Thongkhoun Vongsaphay, Geralindine Marlow, Maria Grado, Nona Acy, Olga Mills, Mark Livar, Rudy Raygoza, Carmen Cuellar, Ben Wallace, Martin Ellis, Sixto Reveles, Guadalupe Bautista, Jerry McClarty, Mary Alvarez, Jesse Mendoza, Gene Hernandez, Elio Mata, Anthony Ramsey, Alex Bonney, Mary Mallett, Blanca Rios, Lupe Ramirez, Manuel Alarcon, Fermin Barrera,

Santos Briones, Oscar Aparicio, Martha Elena Chavez, Romulo Avina, Benny Dunn, Gerardo Camarillo, Gustavo Garcia, Bertha Carrera, Rudy Gonzales, Manuel Contreras, Gumaro Chavarria, Ramon Enriquez, Eddie Hernandez, Carlos Garza, Esperanza Lara, Jim Nabours, George A. Richardson, Jr. Juan Meza, Alfredo Vara, Guadalupe Robledo, Edith Ortiz, Jonathan Lopez, Eligio Quantanilla, Silvino Calderon, Dianna Westbrook, Nicholas Sanchez, Arthuro Silva, Ray Williams, Jacque Williams, Guadalupe Castillo, Carmela Sifuentes, Macario Ojeda, Octavio Chavez and Alberto Rodriquez.

The above-named persons are Plaintiffs at the trial court level in case No. B-95-26, *Quezada, et al. v. Excel Corporation and Cargill, Inc.*

5. Gloria Rhoads, Linda Collins, Jose Luis Marquez, Miguel Angel Hernandez, Agustin Lara, Daniel Mendoza, Lawanda Hunt, Teddy Gutierrez, Jesse Tarango, Marixa Sotelo, Irma Lomas and Margarita Torres.

The above-named persons are Plaintiffs at the trial court level in case No. B-95-37, *Rhoads, et al. v. Excel Corporation and Cargill, Inc.*

6. Javier Arpero, Bobby Darty, Andres de la Rosa, Narcy Espinoza, Selma Guzman, Leon Hernandez, Jr., Maria Teresa Nieto, Horacio Nunez, John Snell, Gumercindo Villa and Wanda Yado.

The above-named persons are Plaintiffs at the trial court level in case No. B-95-115, *Arpero, et al. v. Excel Corporation and Cargill, Inc.*

7. Santiago Morales

Mr. Morales is Plaintiff at the trial court level in case No. B-95-169, *Morales v. Excel Corporation and Cargill, Inc.*

RESPONDENTS:

1. Excel Corporation

2. Cargill, Inc.

The above-named entities are Defendants at the trial court level in each of the eight cases that are the subject of this Writ of Certiorari.

3. Freddie Franklin

Mr. Franklin is a Defendant at the trial court level in case No. B-94-313, *Rendon v. Excel Corporation, Cargill, Inc., and Freddie Franklin*, case No. B-94-321, *Trevizo v. Excel Corporation, Cargill, Inc., and Freddie Franklin*, and in case No. B-94-322, *Trevizo v. Excel Corporation, Cargill, Inc., and Freddie Franklin*.

4. Steve Steffe

Mr. Steffe is a Defendant at the trial court level in case No. B-94-323, *Moreno v. Excel Corporation, Cargill, Inc., and Steve Steffe*.

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STATEMENT OF JURISDICTIONAL GROUNDS

On September 26, 1996, Petitioners filed a "Motion to Consolidate, Motion for Remand and for Ruling on Pending Motions to Remand." After reading Respondent's Response, the Magistrate Judge entered an Order and made Findings of Fact and Conclusions of Law on October 23, 1996. The Respondents filed Objections to the Magistrate's Order and Findings, and on November 21, 1996, the District Judge entered an order which adopted the Magistrate's order and findings, and set forth reasons for remand which included lack of subject matter jurisdiction.

Respondents complained of the United States District Court's order consolidating the cases and remanding the consolidated case to state court. The Respondents filed a Petition for Writ of Mandamus requesting that the Fifth Circuit Court of Appeals order the United States District Court to withdraw its order of remand and consolidation. The Fifth Circuit ruled on the Petition for Writ of Mandamus on February 19, 1997, vacating the United States District Court's original orders for remand and consolidation.

Petitioner subsequently brought a Petition for Review and a Suggestion for Rehearing En Banc, raising the jurisdictional issue of whether the Fifth Circuit had the jurisdiction to review the District Court's remand order. The Petition for Rehearing and Suggestion for Rehearing En Banc were denied on March 17,1997.

According to 28 U.S.C. § 1254, the Supreme Court of the United States has jurisdiction in this matter. Title 28 U.S.C. § 1254 states that a case in the courts of appeals may be reviewed by the Supreme Court by granting a Writ of Certiorari to any party to a civil case, before or after rendition of any decree; such is the case at bar.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1445(c):

> (c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

28 U.S.C. § 1447(c)(d):

> (c) A motion to remand the case on the basis of any defect must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF CASE

The Respondants operate two meat-packing plants in the Texas Panhandle. Each Petitioner was employed as a laborer in one of the plants. Each Petitioner has filed a lawsuit against Excel Corporation, and its parent corporation Cargill, Incorporated. Several of the Petitioners named a non-diverse individual Defendant, either Steve Steffe or Freddie Franklin. Each state court action is a claim for personal injuries and retaliation or wrongful discharge.

After being removed to Federal Court, the District Court for the Southern District of Texas, Brownsville Division consolidated all the cases and remanded the consolidated case to state court. Among its conclusions, the District Court found that there was **no** Federal Question, **no** Diversity Jurisdiction, and that the removal of the claims was prohibited under 28 U.S.C. § 1445(c), a provision which forbids removal of civil actions arising under state worker's compensation laws. After granting Respondent's Writ of Mandamus, the Fifth Circuit Court of Appeals evaded the well-settled prohibition against review of remand orders by finding that the remand order was

based "solely" on § 1445(c), effectively ignoring all other District Court conclusions.

This cause should never have been in the federal system as no federal jurisdiction ever existed. More importantly, Petitioners contend that the Fifth Circuit Court of Appeals had no jurisdiction to review the United States District Court's remand order based on 28 U.S.C. § 1447(d). This Court, the Supreme Court of the United States, traditionally exercises jurisdiction to review an appellate court's decision where the appellate court erroneously assumed jurisdiction.

> Usually where a court has no jurisdiction of a case, the correct practice is to dismiss the suit, but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction and has . . . improperly decreed affirmative relief to a claimant.

Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan, 111 U.S. 379, 384 (1884). See also, *United States v. Huckabee*, 16 Wall. 414 (1872). In the case at bar, the Fifth Circuit Court of Appeals erroneously assumed jurisdiction to review the United States District Court's remand order after the United States District Court affirmatively decreed that no federal jurisdiction existed. Therefore, based on well-established case law, this Court has jurisdiction to review the Fifth Circuit's decision in order to redress the Fifth Circuit's improper exercise of jurisdiction.

I. THE COURT OF APPEALS REVIEWED A CONSOLIDATION AND REMAND ORDER IN DIRECT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

A. Appellate review of Remand Orders is an important Federal Question.

This case commands the attention of the United States Supreme Court because the actions of the Fifth Circuit Court of Appeals interjected into the case the important federal question of whether a remand order is subject to review under these circumstances.

This Court has heard numerous cases regarding appellate review of remand orders. *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712 (1996); *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494 (1995); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331 (1976). The number of cases this Court has heard regarding appellate review of remand orders affirmatively demonstrates the importance of this issue as a Federal Question.

Nothing tempts a court to exercise jurisdiction more than being told it has no power to act. This Court has told the Fifth Circuit in the past not to review an order of remand based

on lack of subject matter jurisdiction, however this present action represents an attempt to carve out an exception to the rule. *Gravitt v. Southwestern Bell Telephone Co., 430* U.S. 723 (1977). The rule prohibiting the review of remand orders is meaningless if the circuit courts can side step the rule.

In the case at bar, appellate review of the remand order is governed by several federal statutes, including 28 U.S.C. §1445 and § 1447. The uniform interpretation and enforcement of these federal statutes is paramount for the uniform application of federal law. By granting certiorari, this Court can remedy the dangerous precedent established by the Fifth Circuit regarding the important federal question of remand order review and continue to insure the uniform application of federal law.

B. Relevant decisions of this Court and others demonstrate that the District Court's Order of Remand was not reviewable because lack of subject matter jurisdiction was one of the reasons given by the District Court for its Order of Remand.

Appellate jurisdiction to review a district court's order of remand is governed by 28 U.S.C § 1447(d). Section 1447(d) declares that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ." 28 U.S.C. § 1447(d). The Supreme Court of the United States has coupled this statutory provision with

the grounds specified in § 1447(c), absolutely barring all appellate review of remand orders based on lack of subject matter jurisdiction by appeal, mandamus, or otherwise. *See* 28 U.S.C. § 1447(c); *See also, Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1718 (1996); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 336 (1976); *Linton v. Airbus Industries*, 30 F.3d 592 (5th Cir. 1994). However, a narrow exception to this absolute bar of appellate review of remand orders has emerged when the remand order is explicitly outside the realm of 28 U.S.C. § 1447(c). See, *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494 (1995); *In re Merrimack Mutual Fire Ins.. Co.*, 587 F.2d 642, 647 (5th Cir. 1978).

Additionally, even if a remand order is conspicuously void of any reference to § 1447(c), "the order is unreviewable if, by substantially similar language, it is evident that the court intends to remand for the grounds recited in § 1447(c)." *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. at 494. Courts have consistently held that any substantive adherence to § 1447(c), even in the absence of a specific reference, is sufficient to preclude review. *See In re Weaver*, 610 F.2d 335, 337 (5th Cir. 1980) (denying writ of mandamus despite the absence of specific § 1447(c) words, when the district court based remand upon its belief that jurisdiction was lacking). *See also Merrimack*, 587 F.2d at 647-48 (holding that the District Court's order, while not referring to § 1447(c) by number,

stated as one of its grounds no jurisdiction, thereby precluding review by mandamus).

Similarly in the case at bar, the United States District Court, without specifically citing § 1477(c), expressly concluded remand was proper due to lack of subject matter jurisdiction. If a district court cites lack of subject matter jurisdiction as just one of its grounds for remand, the entire remand order is sufficiently cloaked under § 1447(c) and receives "absolute immunity from review." *Tillman v. CSX Transp. Inc.* 929 F.2d 1023, 1028 (5th Cir. 1991) (citing *Gravitt*, 430 U.S. at 723-24; *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331, 1333, (1976); *In re Weaver*, 610 F.2d at 337). Therefore, because the District Court explicitly cited lack of subject matter jurisdiction as one of the reason for remand, the Fifth Circuit had no jurisdiction to review the Remand Order.

C. A United States District Court's Order of Consolidation made specifically for the purpose of remand is not reviewable.

Since the Fifth Circuit lost jurisdiction over the remand order because it was remanded, in part, for lack of subject matter jurisdiction, there was no way for the Fifth Circuit to review the accompaning consolidation order. Because these two orders were collateral with one another, they were inseparable for the purpose of review.

The United States District Court consolidated all these cases for the purpose of remanding them all in one order. The District Court's Finding of Facts and Conclusions of Law were made for no other reason than for the purpose of determining whether or not to remand these causes back to state court. All of these cases naturally have different factual scenarios, different remand schedules, and some even have additional defendants, but the factual reason why these causes were consolidated remains the same: remand. Remand was the singular purpose for consolidating all of these cases, all of these cases are state law tort claims with no federal jurisdiction which, for that reason alone, required that they be remanded.

In vacating the United States District Court's original remand order, the Fifth Circuit looked to the preceding consolidation order and found it improper. The Fifth Circuit found that the District Court abused its discretion by consolidating the cases for purposes of determining remand. After determining that the consolidation order was improper, the Fifth Circuit used the improper consolidation order as leverage for assuming jurisdiction over the remand order. The District Court reasoned that because the consolidation order was improper, the subsequent remand order was also improper and therefore reviewable.

In *Tillman v. CSX Transportation, Inc.*, 929 F.2d 1023 (5th Cir. 1991), the District Court allowed the joinder of an additional defendant, and then remanded for lack of subject matter jurisdiction. The Fifth Circuit found that review was

barred by U.S.C. 28 § 1447(d), and that it did not matter whether the amended pleadings and joinder were proper. The Fifth Circuit even held that it did not matter that the trial court was mistaken in its belief that it lacked subject matter jurisdiction and even emphasized its "complete inability to do anything about the trial court's joinder order, whether interlocutory or final, because what we cannot review we cannot by some juridical self-help get back to federal court." *Id.* at 1028. Where review of the District Court's joinder order for the purpose of remand was unreviewable in *Tillman*, likewise in the case at bar, the District Court's consolidation order for the purpose of remand was also unreviewable.

Additionally, even if the consolidation order was reviewable, it could not affect the remand order. See, *Tillman*, at 1026 (citing *Waco v. United States Fidelity and Guaranty Co.*, 293 U.S. 140 (1944). Both the *Tillman* and the *Waco* courts held that the remand order for lack of subject matter jurisdiction was not reviewable, even if related orders that might form the basis for the remand were reviewable.

CONCLUSION AND PRAYER FOR RELIEF

The Fifth Circuit, through its judicial gyrations and gymnastics, has failed to follow the clear, mandatory precedent established by this Court and others in applying these Federal Statutes. The Fifth Circuit has engaged in juridical self-help to justify jurisdiction. This Court has previously granted certiorari in cases where substantial conflicts with relevant decisions

exists. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992) (certiorari granted because "of the importance of the federal question and the likelihood that it had been decided in a way conflicting with applicable decisions of the Courts); *See also New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *United Mine Workers of Am. District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967). The case as bar merits this Court's consideration because of the importance of the issue in question and the manner in which the Fifth Circuit deviated from the clear, mandatory precedent established by this Court and others.

Additionally, the Fifth Circuit's review of an accompanying order of consolidation with remand, highlights an important question of federal law that has not been, but should be, settled by the United States Supreme Court. The question of whether or not an accompanying order of consolidation for the purpose of remand is reviewable even though the remand order itself is not reviewable is a question which this Court has never specifically addressed and deserves consideration.

WHEREFORE, premises considered, Petitioners respectfully request that this Court grant Petitioners' Petition for Writ of Certiorari and clarify the correct interpretation and application of Federal Law.

Respectfully Submitted,

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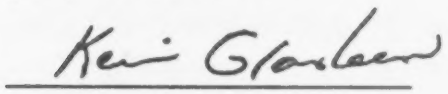

Kevin Glasheen
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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

EFRAIN RENDON,	§	
V.	§	CA-B-94-313
EXCEL CORPORATION,	§	(1 Case)
et. al	§	

ROBERTO MORENO,	§	
V.	§	CA-B-94-323
EXCEL CORPORATION,	§	(1 Case)
et. al	§	

RAMON TREVIZO,	§	
V.	§	CA-B-94-321
EXCEL CORPORATION,	§	(1 Case)
et. al	§	

RAMON TREVIZO,	§	
V.	§	CA-B-94-322
EXCEL CORPORATION,	§	(1 Case)
et. al	§	

ALFREDO QUEZADA,	§	
et al	§	
V.	§	CA-B-95-26
EXCEL CORPORATION,	§	(64 Cases
et. al	§	consolidated)

GLORIA RHOADS,	§	
et al	§	
V.	§	CA-B-95-37
EXCEL CORPORATION,	§	(12 Cases
et. al	§	consolidated)

JAVIER ARPERO,	§	
et al	§	
V.	§	CA-B-95-115
EXCEL CORPORATION,	§	(11 Cases
et. al	§	consolidated)
SANTIGO MORALES	§	
V.	§	CA-B-95-169
EXCEL CORPORATION,	§	(1 Case)
et. al	§	

ORDER

On the 23rd day of October, 1996, came on to be heard Plaintiffs' Motions to Consolidate, Motion for Remand and for Ruling on Pending Motions to Remand in the above-entitled and numbered causes. After due consideration of Plaintiffs' Motion, the Court finds that Plaintiffs' Motion to Consolidate, Motion for Remand and for Ruling on Pending Motions to Remand should be GRANTED. Attached to this Order are findings of fact and conclusions of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion to Consolidate, Motion for Remand and for Ruling on Pending Motions to Remand is GRANTED.

IT IS FURTHER ORDERED, that the above-entitled and numbered causes shall be consolidated under C.A. No. B-94-313.

IT IS FURTHER ORDERED, that the consolidated cause be remanded to State Court.

SIGNED this 23rd day of October, 1996.

/s/ Fidencio Garcia, Jr.
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ALFREDO QUEZADA, et al.,	§	CA-B-95-26
	§	
GLORIA RHOADES, et al.,	§	CA-B-95-37
	§	
JAVIER ARPERO, et al.,	§	CA-B-95-115
	§	
EFREN RENDON,	§	CA-B-94-313
	§	
ROBERTO MORENO,	§	CA-B-94-323
	§	
RAMON TREVIZO,	§	CA-B-94-321
	§	
RAMON TREVIZO,	§	CA-B-94-322
	§	
SANTIAGO MORALES	§	CA-B-95-169
Plaintiffs,	§	
	§	
Vs.	§	
	§	
EXCEL CORPORATION,	§	
et al.,	§	
	§	
Defendants.	§	BROWNSVILLE, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this 23rd day of January, 1996, came on to be considered Plaintiffs' Motion for Remand. After considering the Motions, Briefs, Reply Briefs, Affidavits and arguments of counsel, the Court finds that the Motion should be granted.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. THE COURT FINDS THAT these cases were originally filed in the State District Courts of Cameron County and thereafter removed to this Court and assigned the cause numbers as stated below. In addition, each cause number consists of the said claims of the stated number of Plaintiffs:

Cause No. CA-B-95-26
Alfredo Quezada, et al.
(64 cases consolidated; filed 2/3/95)

Cause No. CA-B-95-37
Gloria Rhoads, et al.
(12 cases consolidated; filed 3/3/95)

Cause No. CA-B-95-115
Javier Arpero, et al.
(11 cases consolidated; filed 7/20/95)

Cause No. CA-B-94-113
Efren Rendon
(1 case; filed 11/21/94)

Cause No. CA-B-95-169
Santiago Morales
(1 case; filed 10/13/95)

Cause No. CA-B-94-323
Roberto Moreno
(1 case; filed 12/9/94)

Cause No. CA-B-94-321
Ramon Trevizo
(1 case; filed 12/9/94)

Cause No. CA-B-94-322
Ramon Trevizo
(1 case; filed 12/9/94)

2. THE COURT FINDS THAT the Defendants timely removed the actions. The Defendants allege Federal Jurisdiction (based upon Federal Question) and Diversity Jurisdiction (based upon claims of Fraudulent Joinder). The claims of Fraudulent Joinder refer to the joinder of Cargill, Inc., a corporate defendant, and to various individual defendants, including Steve Steffe, Mark Neill, Dave Stafford and Freddie Franklin, as those individuals are named in the individual pleadings;

3. THE COURT FINDS THAT the above entitled cases

are consolidated for the purposes of considering Plaintiff's Motions to Remand, which are timely filed in the consolidated case.

4. THE COURT FINDS THAT each Plaintiff has alleged a cause of action sounding in personal injury. Each of the Plaintiff's personal injury claims are alleged to have occurred while in the course and scope of their employment for Excel and/or Cargill, Inc.

5. THE COURT FINDS THAT in each claim, the Plaintiff has alleged discrimination or retaliation under Tex. Rev. Civ. Stat. Art. (ann.) 8307(c). The petitions allege that each of the Plaintiffs are systematically retaliated against and discriminated against for having pursued a claim for personal injury. Additionally, some of the petitions include allegations of wrongful discharge.

6. THE COURT FINDS THAT at all times relevant to these causes of action, the Plaintiffs were individuals employed by Excel and/or Cargill, Inc.;

7. THE COURT FINDS THAT each Plaintiff has alleged independent causes of action against Cargill, Inc., based upon theories of negligence in providing safety management and safety consultation services to Excel

Corporation. Accordingly, THE COURT FINDS THAT a cause of action exists against Cargill, Inc., based upon an independent theory negligence, thereby making them susceptible to potential independent liability for Plaintiff's individual claims.

8. THE COURT FINDS THAT evidence was presented sufficient to create a fact question that Cargill, Inc., exercises independent management control of the claims for injury presented by the Plaintiffs. Accordingly, THE COURT FINDS THAT Cargill, Inc., is potentially liable to claimants for claims of discrimination or retaliation under Tex. Rev. Civ. Stat. Art. (ann.) 8307(c)

9. THE COURT FINDS THAT at all times relevant to these causes of action, the individual Defendants, Steve Steffe, Mark Neill, Dave Stafford and Freddie Franklin, had authority for matters of safety at the relevant Excel Plant(s) and the terms and conditions of Plaintiffs' employment;

10. THE COURT FINDS THAT Defendant Steve Steffe is a Texas resident;

11. THE COURT FINDS THAT Defendant Mark Neill is a Texas resident.

12. THE COURT FINDS THAT Defendant Dave Stafford is a Texas resident.

13. THE COURT FINDS THAT Defendant Freddie Franklin was a New Mexico resident;

14. THE COURT FINDS THAT Excel Corporation and Cargill, Inc., are both incorporated in the State of Delaware and their principal places of business in the States of Kansas and Minnesota, respectively.

15. THE COURT FINDS THAT each Plaintiff is a resident of Texas or New Mexico and has joined a non-diverse individual defendant.

Based upon the foregoing, the Court reaches the following:

CONCLUSIONS OF LAW

1. THE COURT CONCLUDES THAT there is at least a possibility that the State Courts would hold that there are causes of action against the instate Defendants and that fact issues remain as to these causes of action;

2. THE COURT CONCLUDES THAT there is no Fraudulent Joinder as it relates to the individual defendants, Steve Steffe, Mark Neill, Dave Stafford and

Freddie Franklin, and, no Fraudulent Joinder as it relates to the corporate defendant, Cargill, Inc.

3. THE COURT CONCLUDES THAT there is no Federal Question presented;

4. THE COURT CONCLUDES THAT there is no Diversity Jurisdiction;

5. THE COURT CONCLUDES THAT the Plaintiffs' claims are not preempted by the Employment Retirement Income Security Act (ERISA), 29 U.S.C. 1001, et. seq.;

6. THE COURT CONCLUDES THAT removal of these claims is prohibited because they each arise under Texas Workers' Compensation Law; and

7. THE COURT CONCLUDES THAT the cases, as cited in Paragraph 1 in its Findings of Fact, should be remanded to the State Court(s) from which they were removed.

SIGNED at Brownsville, Texas, this 23rd day of October, 1996.

/s/ Fidencio Garza, Jr.
FIDENCIO GARZA, JR.
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

EFRAIN RENDON,	§	
V.	§	CA-B-94-313
EXCEL CORPORATION,	§	
et. al	§	

ROBERTO MORENO,	§	
V.	§	CA-B-94-323
EXCEL CORPORATION,	§	
et. al	§	

RAMON TREVIZO,	§	
V.	§	CA-B-94-321
EXCEL CORPORATION,	§	
et. al	§	

RAMON TREVIZO,	§	
V.	§	CA-B-94-322
EXCEL CORPORATION,	§	
et. al	§	

ALFREDO QUEZADA,	§	
et al	§	
V.	§	CA-B-95-26
EXCEL CORPORATION,	§	
et. al	§	

GLORIA RHOADS,	§	
et al	§	
V.	§	
EXCEL CORPORATION,	§	CA-B-95-37

et. al	§	
JAVIER ARPERO, et al	§	
V.	§	
EXCEL CORPORATION,	§	CA-B-95-115
et. al	§	
SANTIGO MORALES	§	
V.	§	CA-B-95-169
EXCEL CORPORATION,	§	
et. al	§	

ORDER

Before this Court is Plaintiff's Motion to Consolidate and Remand. After a De novo review, this Court fully adopts the Order of Remand by the Honorable Fidencio Garza, Jr. United States Magistrate Judge, signed October 23, 1996.

Regarding the diversity issue, it has been alleged that Plaintiff's joined non-diverse individual Defendants in order to defeat the federal diversity jurisdiction. Where the removing party alleges "fraudulent joinder," the burden is upon that party to prove diversity. The removing party must show "that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court." B., Inc. vs Miller Brewing Company, et al, 663 F.2d. 545, 549 (5th Cir. 1981). The record reflects that the individual defendants in

question were employed by Excel corporation at the time of the alleged incidents. Further, these individuals held positions of a managerial capacity which included responsibilities that directly pertained to employment safety. The Defendants have argued that the individual defendants cannot be held liable as agents of Excel Corporation, however that does not eliminate the "possibility" of a valid cause of action set forth by the Plaintiffs. The burden is very difficult, and the district court must evaluate all of the factual allegations in the light most favorable to the plaintiff. *Id.* The claims that do not involve issues of diversity jurisdiction are not adversely affected by the findings of fact and conclusions of law regarding diversity jurisdiction.

The Plaintiffs in these cases, basically have two main claims: work related personal injury claims caused by unsafe working conditions and retaliatory discharge claims for reporting such injuries. This Court holds that both claims "arise under" the Workmen's Compensation Laws of Texas, and pursuant to 28 U.S.C. § 1445(c) both claims are not removable. Section 1445(c) states that a civil action in any State court arising under the Workmen's Compensation Laws of such State may not be removed to any district court of the United States." This Court further holds that neither claims are preempted by ERISA.

In Hook v. Morrison Milling Co. 38 F2d 776 (5th Cir.

1994), the Court held that a work related personal injury claim against an employer, "which was a nonsubscriber to the worker's compensation system and which provided employees with a workers' compensation-like ERISA plan, was not preempted by ERISA." The Court rules that Plaintiffs' personal injury claims are not removable under section 1445(c) and that the ERISA preemption does not apply.

According to Jones V. Roadway Exp., Inc, 931 F.2d 1086, 1090 (5th Cir. 1991), employees have a right to be free from a retaliatory discharge for pursuing workers' compensation claims. "This right originated from Texas law which was enacted to protect employees seeking compensation for work related injuries." *Id.* The Jones court was satisfied that a retaliatory discharge case arises under the workers' compensation laws of Texas within the meaning of section 1445(c). *Id.* at page 1093.

The Defendant argues that they are nonsubscribers to the Texas Workers' compensation system and that ERISA preempts the Plaintiff's causes of action. The issue to consider is whether the retaliatory discharge claim is independent or if it "relates to" an employee benefit plan. Rozzell v. Security Services, Inc., 38 F.3d 819, 821 (5th Cir. 1994). This Court holds that the removal was improper under section 1445(c), and that ERISA will not preempt the Plaintiff's discharge claim. The substance of the

Plaintiff's claim is limited to the state law retaliatory discharge cause of action, and Plaintiff does not state a cause of action which "relates to" an employee benefit plan. *Id.* at page 822-823. Further, this Court adopts the logic and "classic metaphor that the ERISA preemption may be used as a shield but not as a sword in order to avoid litigation in state court." Rokohl v. Texaco, Inc., 77 F.3d 126, 130 (5th Cir. 1996).

Regarding consolidation of these cases for the purposes of remand, it has been alleged that consolidation was improper because it was used to join the substantive claims of all parties. The District Courts have broad discretion under subdivision (a) of Rule 42, Federal Rules of Civil Procedure to consolidate causes pending in the same jurisdiction. In re Dearborn Marine Service, Inc., C.A. Tex.1974, 499 F.2d 263, rehearing denied 512 F.2d 1061, certiorari dismissed 96 S.Ct. 163, 423 U.S. 886, 46 L.Ed.2d 118. In the cases presented to the magistrate, consolidation is not clearly erroneous and contrary to law.

Each of these claims involve the same issues of law and fact with regard to the necessity of remand. Both the personal injury and the wrongful discharge claims arise under the Texas Workers Compensation Act which renders both claims non-removable under 28 U.S.C. § 1445(c). Therefore, consolidating these cases for the purposes of remand is within the discretion of

the Magistrate Judge.

Accordingly, the Plaintiffs' Motion for Remand is GRANTED.

Done this 21st day of November, 1996.

/s/ Filemon B. Vela
FILEMON B. VELA
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-41220

In re: EXCEL CORPORATION; CARGILL, INCORPORATED; FREDDIE FRANKLIN; STEVE STEFFE,

Petitioners.

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas, Brownsville

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Before JONES, DeMOSS, and PARKER, Circuit Judges.

BY THE COURT:

Petitioners Excel Corporation (Excel), Cargill, Inc. (Cargill), Freddie Franklin, and Steve Steffe (collectively "the defendants") filed this petition for writ of mandamus pursuant to 29 U.S.C. § 1651 and FED. R. APP. P. 21(a). The defendants ask this court to issue a writ of mandamus directing the district court to vacate its order that consolidated for purposes of remand the claims and parties of the eight

underlying cases at issue. Because we hold that the district court erred in consolidating these cases and remanding the cases on the basis of that consolidation order, we grant the writ of mandamus, vacate the consolidation order and the remand order, and direct the district court to reconsider the motions to remand on a case by case basis.

BACKGROUND

Eight civil actions were originally filed against the defendants in various state district courts in the southern-most county in Texas, Cameron County, between June 1994 and August 1995.[1] The plaintiffs' claims arise out of their employment at two Excel meat packing plants located in the

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[1] The eight cases at issue are styled as follows:

1. *Rendon v. Excel Corporation, Cargill, Inc., and Freddie Franklin*, No. B-94-313;
2. *Trevizo v. Excel Corporation, Cargill, Inc., and Freddie Franklin*, No. B-94-321 (Trevizo I);
3. *Trevizo v. Excel Corporation, Cargill, Inc., and Freddie Franklin*, No. B-94-322 (Trevizo II);
4. *Moreno v. Excel Corporation, Cargill, Inc., and Steve Steffe*, No. B-94-323;
5. *Quezada, et al. v. Excel Corporation, Cargill, Inc.*, No. B-95-26;
6. *Rhoads, et al. v. Excel Corporation, Cargill, Inc.*, No. B-95-37;
7. *Arpero, et al. v. Excel Corporation, Cargill, Inc.*, No. B-95-115; and
8. *Morales v. Excel Corporation, Cargill, Inc.*, No. B-95-169.

Texas Panhandle towns of Plainview, Hale County, Texas, and Friona, Parmer County, Texas. The defendants timely removed these cases to the United States District Court for the Southern District of Texas, Brownsville Division.

Plaintiffs are employees of Excel, a wholly owned subsidiary of Cargill, and brought these suits alleging various claims of personal injury due to negligence and a single claim of wrongful discharge based on an attempt to pursue a compensation claim for a work related injury. Plaintiffs are all citizens of either New Mexico or Texas. Excel is a Delaware corporation with its principal place of business in Kansas. Cargill is a Delaware corporation with its principal place of business in Minnesota. The individual defendants, Freddie Franklin and Steve Steffe, are citizens of either Texas or New Mexico.

In the first four cases, *Rendon, Trevizo I, Trevizo II, and Moreno*, an individual plaintiff sued Excel, Cargill, and one of the individual defendants. In three of these cases, the plaintiffs alleged that they suffered personal injuries due to the defendants' failure to provide a safe workplace. In *Trevizo II*, the plaintiff alleged that he was wrongfully discharged after he attempted to pursue a claim for compensation for a work-related injury. Defendants invoked diversity jurisdiction in *Rendon, Trevizo I*, and *Moreno*, based on the alleged fraudulent joinder of the non-diverse defendant. In *Trevizo II*, the defendants assert that federal question jurisdiction exists and removal is proper because the plaintiff's wrongful discharge claim falls under the purview of the Employee

Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* (1994), due to Excel's decision not to become a subscriber under the Texas workers' compensation statute.

In the second set of four cases, the plaintiffs sued Excel and Cargill alone. *Quesada* involves 64 plaintiffs, *Rhoads* involves 12 plaintiffs, *Arpero* had 11 plaintiffs, and *Morales* is a single plaintiff case. These plaintiffs allege that they suffered personal injuries in the course of their employment due to the defendants' negligent failure to provide a safe workplace. The 88 plaintiffs involved in these four cases did not name a non-diverse defendant. As such, defendants invoked diversity jurisdiction.[2]

On September 27, 1996, Plaintiffs filed a "Motion to Consolidate, Motion to Remand and for Ruling on Pending Motions to Remand." The case had been assigned to a magistrate judge. The magistrate judge entered an order consolidating these eight cases and adopted verbatim the proposed findings and conclusions submitted by the plaintiffs.[3]

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[2] We also note that some of these plaintiffs may have failed to timely file motions to remand. For example, the defendants timely removed the *Rendon* case on November 21, 1994. The plaintiff filed a motion to remand on January 3, 1995, 43 days after the defendants removed the case. Additionally, the plaintiffs in *Rhoads* waited 41 days to file their motion to remand.

[3] In its findings and conclusions, the magistrate consolidated the eight cases for purposes of considering the plaintiffs' motions to remand. The magistrate expressly found the remand motions to be

The defendants filed timely objections to the magistrate's order. On November 21, 1996, approximately two weeks after the magistrate's consolidation and remand order, the district court issued an order approving the consolidation of these cases for purposes of remand and remanded these cases based on its determination that the claims raised in the consolidated case arise under the Texas Workers' Compensation Act, which rendered them non-removable under 28 U.S.C. § 1445(c).

ANALYSIS

We must first ascertain whether we have jurisdiction to review the district court's order of consolidation and remand. 28 U.S.C. § 1447 (d) severely restricts our authority to review remand orders. "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ." 28 U.S.C. § 1447 (d). The Supreme court has thrice held that "§ 1447 (d) must be read in pari materia with § 1447 (c), so that only remands based on grounds specified in § 1447 (c) are immune from review under

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timely. Although we do not reach this issue, it appears from the face of the record that at least two of the motions to remand were not timely filed. After the consolidation, the magistrate found that "each Plaintiff is a resident of Texas or New Mexico and has joined a non-diverse individual defendant." As explained herein, a consolidation order cannot serve to merge the suits into a single cause. As such, four of the eight cases do not have non-diverse defendants.

§ 1447 (d)." *Quackenbush v. Allstate Ins. Co.*, 116 S.Ct. 1712, 1718 (1996); *see also Things Remembered, Inc. v. Petrarca*, 516 U.S. ___, ___, 116 S. Ct. 494, 495 (1995); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46, 96 S. Ct. 584, 590 (1976). As such, only remand orders based on lack of subject matter jurisdiction or on defects in removal procedure are affirmatively barred from appellate review. *See Quackenbush*, 116 S. Ct. at 1718; *Linton v. Airbus Industries*, 30 F.3d 592, 600 (5th Cir. 1994).

The district court determined that this case involves a worker's compensation remand order based on 28 U.S.C. § 1445 (c) ("A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."). Because we are reviewing a remand order which is not grounded on subject matter jurisdiction or defects in removal procedure under 28 U.S.C. § 1447 (c) we have jurisdiction to consider the propriety of such order.

The Supreme Court has recognized that mandamus may be an appropriate remedy where the district court has remanded the case on grounds not authorized by removal statutes. *See Quackenbush*, 116 S. Ct. at 1718; *Thermtron*, 423 U.S. at 353, 96 S. Ct. at 594. This Circuit has recognized this exception and concluded that "[w]e may review a remand order on a petition for writ of mandamus... provided that it was entered on grounds not authorized by § 1447 (c)." *In re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993); *see also In re Shell Oil Co.*, 932 F.2d 1518, 1521 (5th Cir. 1991).

In the non-§ 1447 (c) context, the Supreme Court in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357, 108 S. Ct. 614, 623 (1988), held that a district court has discretion to remand a case involving pendent claims upon a determination that retaining jurisdiction over such a case would be inappropriate. *See also Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 761 (5th Cir. 1994) ("a remand order is reviewable if it is based upon the *Carnegie-Mellon* rationale, but is immune from review if it is based upon the grounds enumerated in Section 1447(c).").

Relying on *Cohill*, this Court has held that courts of appeals may review remand orders that are issued on grounds other than § 1447 (c). *See Bogle*, 24 F.3d at 761. Because the Supreme Court has permitted our review of remand orders based on provisions other than § 1447 (c), *Quackenbush*, 116 S.C. at 1718, and because we are bound by prior panel opinions, *Trizec Prop., Inc. v. United States Mineral Prod. Co.*, 974 F.2d 602, 604 N.9 (5th Cir. 1992) (recognizing that we are "bound to prior panel opinions absent en banc reconsideration or a superseding contrary Supreme Court case"), *Bogle* permits our review of the district court's order remanding this case on § 1445 (c) grounds. *Bogle*, 24 F.3d at 761.

In the instant case, the district court issued an order consolidating these eight cases, and then based its decision to remand the eight cases by considering them as a single cause. The district court then applied 28 U.S.C. § 1445 (c), the provision which forbids removal of civil actions arising under

state worker's compensation laws, to the consolidated case and remanded the cause to state court.[4] The district court found that both the personal injury claims and the wrongful discharge claim arose under the worker's compensation laws of the State of Texas and ruled that the magistrate's order consolidating these cases for purposes of remand was, therefore, proper. Accordingly, the district court's remand order in this case was based solely on § 1445 (c) not § 1447 (c) and, therefore, we may review the propriety of that order. *See Bogle*, 24 F.3d. at 761.

Having established our jurisdiction to consider this case, this Court will issue a writ of mandamus "to remedy a clear usurpation of power or abuse of discretion." *In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995) (citations and quotations omitted). Here, the district court adopted the magistrate's order consolidating these eight cases for purposes

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[4] Section 1445 (c) is not jurisdictional. If a defendant removes a civil action arising under a state's workers' compensation laws, we have held that the wrongful removal is a procedural defect is waived under 28 U.S.C. § 1447 (c), if not raised in 30 days. *Williams v. AC Sparkplugs*, 985 F.2d 783 (5th Cir. 1993).

On remand from this decision, the district court should first ascertain whether each individual case does, in fact, arise under the workers' compensation laws of Texas. *See Patin v. Allied Signal, Inc.*, 77 F.2d 782, 786 (5th Cir. 1996) (analyzing when a cause of action arises under the administrative procedures applicable to a state workers' compensation claim). If the individual cases do arise under the workers' compensation laws of Texas, the district court should determine whether the plaintiffs properly and timely objected to the removal under § 1447 (c).

of remand. By consolidating these cases and then remanding them on § 1445 (c) grounds, the district court erred by merging these suits into a single cause which altered the rights of some of the parties involved. *See Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97 (1933); *Langley v. Jackson State Univ.*, 14 F.3d 1070, 1073 n.5 (5th Cir. 1994); *Kuehne & Nagle (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 287 (5th Cir. 1989). Before Rule 42 (a) was adopted, the Supreme court in *Johnson v. Manhattan Railway Co.*, 289 U.S. at 496-97, held that consolidation "does not merge suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." We have adhered to this instruction after the adoption of Rule 42 (a). *See Langley*, 14 F.3d at 1073; *Kuehne*, 874 F.2d at 287; *McKenzie v. United States*, 678 F.2d 571, 574 (5th Cir. 1982); Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2382 at 430 (1995). Consequently, the district court abused its discretion by consolidating these suits for purposes of determining the propriety of remand.

In four of these cases, the plaintiffs did not sue a non-diverse defendant. Further, it appears that the plaintiffs in the *Rendon* case filed their motion to remand on January 3, 1995, 43 days after the defendants removed the case. Additionally, the plaintiffs in *Rhoads* waited 41 days to file their motion to remand. By considering these eight cases as one single cause after the consolidation order, the district court adversely affected the rights of the defendants by failing to separately determine the jurisdictional premise upon which each stands

and the propriety of removal or remand resulting therefrom.

CONCLUSION

Finding that the order of consolidation and the ensuing remand order on the basis of that consolidation adversely affected the parties in this case, we grant the defendants' writ of mandamus, vacate the consolidation and remand order, and instruct the district court to consider each plaintiffs' motion to remand on a case by case basis, determining in each case as appropriate the issues of diversity of citizenship, federal question, fraudulent joinder,[5] timeliness of remand motion and non-removability of workers' compensation claims.

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[5] While we express no opinion as to the resolution of this issue, the recently decided Supreme Court of Texas case *Leitch v. Hornsby*, 935 S.W.2d 114, 120 (Tex. 1996) may be pertinent to a determination of the defendants' fraudulent joinder claims. In *Leitch*, the court held that a company's employees have no duty to furnish a safe work place and, as such, may not be held liable in their individual capacities for the company's negligent failure to provide a safe place to work. *Leitch*, 935 S.W.2d at 120.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-41220

In Re: EXCEL CORPORATION; CARGILL INCORPORATED; FREDDIE FRANKLIN; STEVE STEFFE

Petitioners

Appeal from the United States District Court for the Southern District of Texas, Brownsville

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 2/19/97, 5 Cir., _____, _____, F.3d _____)

Before JONES, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss
United States Circuit Judge

REHG-4